WINLOCK VENEER CO.,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 91-105-A
JUNEAU AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	September 29, 1992

Appellant Winlock Veneer Company seeks review of a February 28, 1991, decision of the Juneau Area Director, Bureau of Indian Affairs (Area Director; BIA), regarding damages for appellant's breach of Timber Contract No. E00C14203082 (contract), between appellant and the owners of Chilkat Valley Native Allotments AA007884 (John Berry), AA06618 (Mary Jane Valentine, Henry Gene Jacquot, Amber Michelle Jacquot, Lawrence Eugene Jacquot, Tammy Kay Valentine, Carrie Ann Valentine, and Deanna Lynn Valentine), AA08036 (Henry Jacquot), and AA008035 (Larry Jacquot). In a decision issued on May 2, 1991, the Board of Indian Appeals (Board) affirmed the Area Director's decision that appellant had breached the contract. Winlock Veneer Co. v. Acting Juneau Area Director, 20 IBIA 3, recon. denied, 20 IBIA 100 (1991) (Winlock I). For the reasons discussed below, the Board affirms the Area Director's February 28, 1991, decision. 1/

1/ The Area Director sought dismissal of this appeal on the grounds that appellant's notice of appeal raised only issues relating to whether or not it had breached the contract, an issue which was decided in Winlock I. On June 18, 1991, the Board issued an order to show cause as to why the appeal should not be dismissed. After considering the responses to that order, the Board determined that appellant had made one allegation that attacked the Area Director's determination of damages. That allegation, as stated on page 3 of appellant's "addendum" to its response, asserted: "The Area Director states that 'the Purchase price that Nissho Iwai American Corporation [Nissho] paid in Situ for this very same timber constitutes the best evidence of the timbers resale value,' . . . . This is completely incorrect."

Based upon this allegation, in a Nov. 12, 1991, order, the Board denied the Area Director's motion to dismiss and gave the parties an opportunity to brief the legal issue of whether the purchase price paid by Nissho was the best evidence of the timber's resale value. The Board informed the parties that it would not consider arguments relating to any other issue. Both the Area Director and appellant filed briefs.

The facts of this case are fully set forth in Winlock I, at 4-13. Those facts will be repeated here only to the extent necessary for an understanding of this order.

The contract, which was approved by BIA on November 27, 1987, provided that all designated timber was to be cut and paid for by April 15, 1990, and all other obligations were to be completed before the contract expiration date of June 30, 1990. The contract established a basic stumpage rate for each species of tree, with a provision for profit-sharing of any amount received for the timber above the basic stumpage rate. As explained by the Area Director at pages 4-5 of his answer brief in Winlock I, the contract established

> a profit-sharing arrangement whereby [appellant] was required to report its resale volumes and prices to BIA so that the owner's 75% share of any amount by which the resale price exceeded the adjusted stumpage rate could be calculated. It was expressly stated that the application of the 75% - 25% profit-sharing formula could not result in a reduction of the compensation owed to the allottees, but only in an increase. Because of the foreseeable volatility of the timber markets, and the substantial time lag in the application of the stumpage adjustment mechanism, this profit-share mechanism was counted on to assure the allottees compensation commensurate with the market value of their timber at the time the trees were actually harvested.

During the 1988-89 logging season, appellant harvested approximately 20 to 25 percent of the total cut designated under the contract. Appellant entered into a purchase agreement with Maple Mark International, Inc. (Maple Mark) for this timber. Based on concerns about this sale, including the fact that Maple Mark resold the timber on the dock to Nissho for a substantially higher amount, BIA requested additional information from appellant and conducted an investigation into other comparable sales. After considerable correspondence and discussions, on October 20, 1989, the Area Director notified appellant that the contract was cancelled. This is the decision which was affirmed in Winlock I.

By letter dated February 28, 1991, the Area Director informed appellant that he intended to apply funds previously paid to BIA by appellant against the damages he had determined were owed to the allottees, and found that those funds were not sufficient to cover the damages. The Area Director stated at pages 5-6 of his letter:

> As a result of [appellant's breach], the allottees have not received profit-sharing payments * * *. To quantify the shortfall, it is necessary to determine the amount the timber could have been, and but for [appellant's] breach would have been, resold for. I find that the purchase price that [Nissho] paid in situ for this very same timber constitutes the best evidence of the timber's resale value, and is the most appropriate value with

> reference to which breach of contract damages can be calculated. The reported price paid by Nissho was $1,480,923.55. The total resale price reported by [appellant] * * * was $1,021,023.30 * * *. Under the formula set forth in the [contract], the allottees were entitled to 75% of the difference between $1,029,821.82 and $1,480,923.55, or $338,326.29. * * * Since no interest rate for overdue payments is established in the contract, the statutory rate set by AS 45.45.010 on money after it is due and owing will be utilized.

(Emphasis added).

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency decision complained of was erroneous or not supported by substantial evidence. Winlock I, at 15, and cases cited therein. Here, appellant bears the burden of proving that the Area Director erred in determining that the price paid by Nissho was the best evidence of the actual value of the timber appellant sold to Maple Mark.

Appellant raises numerous arguments in its opening and reply briefs. Most of the arguments concern whether or not it breached the contract, or address other issues decided in Winlock I. Appellant also requests the Board to subpoena certain information which it alleges will show it did not breach the contract or commit any wrongdoing. The Board held in Winlock I that appellant breached the contract; it will not revisit that question, or any other issue decided in that case.

Other of appellant's arguments are not relevant either to the cancellation decision or the determination of damages. The Board will not address arguments that are not relevant to the issue on appeal.

Appellant also requests an opportunity to appear before the Board for various purposes. Because of the disposition of this matter, this request is denied.

The only argument appellant raises which relates to the issue in this case is that the sale to Nissho cannot be used to determine damages because Nissho did not purchase all of the trees cut, or to be cut. Appellant contends that

> [i]f the BIA would have allowed [appellant] to complete the entire sale the allottees may have received less, but depending on the market the following year, the allottees could very well have received that amount or much more had it not been for the BIA's interference. [Appellant] requires the scale and volume totals covering the total sale to include all volumes remaining in the wood and left standing at the conclusion of the re-sale. This information is essential in order to calculate how the allottees would have made out financially if [appellant] had been allowed to complete the timber sale. * * * There is no showing that the

> Nissho Iwai payment was solely for the particular shipment and not part of a larger agreement. It therefore cannot be considered a market rate. It is like comparing "apples and oranges."

(Opening Brief at 6-7).

The Area Director's decision to use the resale price to Nissho in determining damages is reasonable and rational on its face. This resale price represented a sale of exactly the same timber, in exactly the same condition and place, within a few days of the sale by appellant to Maple Mark. The Board finds it difficult to conceive of any other method that would allow so precise a determination of the value of that particular timber.

Appellant's statement that the resale did not include all of the timber that had been cut at that time or that was to be cut under the contract is correct. However, those facts are not relevant to a decision in this case. The value of the entire timber sale is not at issue, and appellant has not been found to owe damages in relation to the entire sale. Appellant has been found to owe damages only in relation to the timber it sold to Maple Mark, and that Maple Mark resold to Nissho.

Furthermore, the evidence is that Nissho reported the sale price paid to Maple Mark as being for the same timber sold by appellant to Maple Mark. There is no suggestion that the sale price was "part of a larger agreement."

Appellant also contends that no damages are due because the timber increased in value and the allottees received more for the remaining timber than they would have if appellant had timely performed under its contract. This contention ignores the fact that the allottees were injured by appellant's failure to obtain a commercially reasonable price for the timber sold to Maple Mark. That is the timber for which damages have been assessed.

In its reply brief, appellant argues for the first time that the Area Director should have calculated damages by using the comparison prices he found during his investigation into whether appellant breached the contract. Although the Board does not condone the presentation of arguments initially in an appellant's reply brief, it will address this argument. Tiger Outdoor Advertising, Inc. v. Eastern Area Director, 22 IBIA 280, 285 (1992).

The comparison prices obtained by the Area Director related to "comparable" sales. Therefore, these prices would need to be adjusted to reflect the exact composition of both the comparable and the actual sale. This need for adjustment would not yield as precise a value for the timber at issue as did the use of the sales price to Nissho. Furthermore, as appellant notes, the use of the comparable prices would have resulted in a higher damage calculation.

Appellant has failed to show that the Area Director's use of the resale price to Nissho in determining damages was erroneous, not supported by substantial evidence, or otherwise arbitrary or capricious.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Juneau Area Director's February 28, 1991, decision is affirmed.

_____
Kathryn A. Lynn
Chief Administrative Judge

_____
Anita Vogt
Administrative Judge